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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. SHANE LEMUEL FULLER, Defendant and Appellant.	C081556 (Super. Ct. No. CRF145725)

Following his no contest plea to possession of child pornography, the trial court suspended imposition of sentence and placed defendant Shane Lemuel Fuller on formal probation for a term of three years with various conditions, including the condition he serve 180 days in county jail. On appeal, defendant challenges a probation condition prohibiting him from using or possessing devices that can access the Internet. He contends this condition should be stricken because it is unconstitutionally vague and overbroad. Defendant further contends several of his probation conditions are unconstitutionally vague because they do not contain a scienter requirement. We will remand this matter for further proceedings as discussed below. In all other respects, the probation order (judgment) is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

During a police investigation into purchasers of child pornography, defendant admitted to visiting Web sites that contained pornographic pictures and videos of children.[1] A forensic examination of defendant's computer revealed 99 still images and two video files believed to be child pornography. The search also revealed defendant had used multiple web browsers, and had sometimes used a browsing mode designed to hide browsing activity. A review of defendant's browsing sessions showed defendant had engaged in numerous sessions with the words "Teen" and "Child" in them and had visited numerous child modeling sites and sites with "Child Porno" in the Web site description. During a search of defendant's residence, several items of pornography were located as well as a Samsung tablet. A forensic examination of the tablet revealed 21 images believed to be child pornography, and a web browsing history showing defendant had visited numerous porn sites with the following words or phrases in their title: "Teen," "Preteen," "Young Little kids," and "Little girls."

Defendant was charged with two counts of possession of child pornography. Pursuant to a plea agreement, defendant pled no contest to one count. The trial court suspended imposition of sentence and placed defendant on formal probation for a period of three years subject to a number of conditions, including the condition he serve 180 days in county jail.

As relevant to this appeal, the trial court also imposed the following additional probation conditions:

"18. Abstain from the use or possession of illegal drugs or narcotics, including marijuana; & not associate with persons known to use any illegal drugs or narcotics, including marijuana; not sell or donate blood or plasma.

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[1] Because defendant pled guilty, the facts are taken from the probation report.

"29. OTHER: Probationer shall provide to the probation department the name, serial number and password(s) for any & all devices within probationer's possession or control, or any device that probationer uses that contains an IP address, including but not limited to: any smartphone, iPad, tablet, laptop computer, and/or desktop computer."

"30. OTHER: Probationer shall not have access to any desktop computer, laptop computer, smartphone, iPad or tablet. The defendant shall not access any file sharing websites, nor utilize file sharing software or applications of any type."

"38. Not view, possess, or have access to any sexually explicit materials, including but not limited to internet websites, magazines, books, photographs, videos, DVD's, or loiter in the area of sexual or pornographic bookstores, massage parlors, sex shops; not access any sexually oriented '800' or '900' telephone numbers."

"39. Shall be prohibited from using any form of encryption, cryptography, steganography, compression, password protected files and/or other method that might limit access to, or change the appearance of, date and/or images, including but not limited to the possession of software or items designed to boot into or utilize, alter or wipe computer media, defeat forensic software, and/or block monitoring software."

Defendant filed a timely notice of appeal. The trial court subsequently granted defendant's request for a certificate of probable cause.

DISCUSSION

A

Legal Principles

"Generally, '[a] condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. . . ." [Citation.]' [Citation.] This test is conjunctive -- all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*People v. Olguin* (2008) 45 Cal.4th 375, 379.)

A probation condition may be challenged as unconstitutionally vague or overbroad. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887.) A probation condition is unconstitutionally vague if it is not " 'sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated.' " (*Id.* at p. 890.) A probation condition is unconstitutionally overbroad if it imposes limitations on a person's constitutional rights and those limitations are not closely tailored to the purpose of the condition. (*Ibid.*) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights -- bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

A challenge to a probation condition as unconstitutionally vague and/or overbroad presents an asserted error that is a pure question of law that may be reviewed even when the challenge was not raised in the trial court. (*In re Sheena K.*, *supra*, 40 Cal.4th at pp. 888-889.) Our review of such a question is de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.)

B

Whether Probation Condition 30 Is Facially Vague And/Or Overbroad

As noted above, probation condition 30 states that defendant "shall not have access to any desktop computer, laptop computer, smartphone, iPad or tablet. The defendant shall not access any file sharing websites, nor utilize file sharing software or applications of any type." Defendant contends this condition should be stricken because it is unconstitutionally vague and overbroad. According to defendant, this condition is unconstitutionally vague because the phrase, "shall not have access to," is subject to multiple meanings. Defendant further contends this condition is unconstitutionally vague because it conflicts with probation condition 29. Defendant also contends probation condition 30 is overbroad because prohibiting him from accessing a computer,

smartphone, or tablet imposes a greater burden on his First Amendment rights than is reasonably necessary to achieve any legitimate state interest.

We are unpersuaded by defendant's contention that probation condition 30 should be stricken because it is subject to multiple meanings. The term "access" is defined as having the "freedom or ability to obtain or make use of something." (Merriam-Webster's Collegiate Dict. (11th ed. 2006) p. 6.) As explained by the probation officer, probation condition 30 is intended to prohibit defendant from using or possessing any electronic device capable of connecting to the Internet. The plain language of the condition, coupled with the probation officer's explanation, render the condition sufficiently precise for defendant to know what is required of him, and for the trial court to determine whether the condition has been violated, to withstand a challenge on the ground of vagueness. (*In re Sheena K., supra*, 40 Cal.4th at p. 890.)

We agree with defendant's contention that probation condition 29 conflicts with probation condition 30. However, we are not persuaded the appropriate remedy is to strike probation condition 30. Probation condition 29 requires defendant to "provide . . . the probation department the name, serial number and password(s) for any & all devices within probationer's possession or control, or any device that probationer uses that contains an IP address, including but not limited to: any smartphone, iPad, tablet, laptop computer, and/or desktop computer." According to the probation officer, this condition was proposed as an alternative to probation condition 30 insofar as it would allow defendant to possess and use devices capable of accessing the Internet but with strict guidelines. When read together, probation condition 30 renders probation condition 29 superfluous. If defendant is prohibited from possessing and using any device capable of accessing the Internet as required by probation condition 30, there is no need for probation condition 29. On the other hand, if defendant is allowed to possess and use devices capable of accessing the Internet as contemplated by probation condition 29, then probation condition 30 conflicts with probation condition 29. Because the record

discloses the trial court intended to impose both conditions, we remand the matter for the trial court to determine which condition to impose.[2]

In light of our decision to remand this matter for further proceedings, we decline to address whether probation condition 30 is unconstitutionally overbroad. If the trial court decides not to impose this condition on remand, defendant's overbreadth challenge will be rendered moot. We direct the trial court and parties to address the validity of probation condition 30 and, if necessary, modify it. (See *In re Victor L.* (2010) 182 Cal.App.4th 902, 923-925 [collecting cases and noting that courts have tended to reject complete Internet bans except in the most aggravated cases, unless they contain a clause allowing Internet access with prior approval of the supervising authority]; *People v. Harrisson* (2005) 134 Cal.App.4th 637, 647 [upholding a complete ban on Internet access].)

C

Scienter Requirement

Defendant contends probation conditions 18, 30, 38, and 39 are unconstitutionally vague because they do not contain a scienter requirement. According to defendant, the way in which these conditions are worded, "put[s] him at risk of unknowingly violating his conditions of probation." We addressed this issue in *People v. Patel* (2011) 196 Cal.App.4th 956.

In *Patel*, we considered a probation condition prohibiting the defendant from drinking or possessing alcohol, or being in a place where alcohol was the chief item of sale. (*People v. Patel*, *supra*, 196 Cal.App.4th at p. 959.) We concluded that the probation condition was invalid for lack of an express scienter requirement. (*Ibid*.) However, we lamented the "dismaying regularity" with which appellate courts must

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[2] We note that defendant's assertion that probation condition 30 was not imposed by the trial court is belied by the record.

consider challenges to probation conditions lacking express scienter requirements. (*Id*. at p. 960.) We noted the "substantial uncontradicted body of case law establishing, as a matter of law, that a probationer cannot be punished for presence, possession, association, or other actions absent proof of scienter," and announced that we would "no longer entertain this issue on appeal, whether at the request of counsel or on our own initiative." (*Ibid*.) Instead, we held that we would "construe every probation condition proscribing a probationer's presence, possession, association, or similar action to require the action be undertaken knowingly." (*Ibid*.) Following our opinion in *Patel*, it is "no longer . . . necessary to seek a modification of a probation order that fails to expressly include such a scienter requirement." (*Id*. at pp. 960-961.)

Probation conditions 18, 30, 38, and 39, like the probation conditions in *Patel*, proscribe defendant's presence, possession, association, or similar action. (*People v. Patel*, *supra*, 196 Cal.App.4th at p. 960.) Accordingly, we construe these conditions to require that the proscribed conduct be undertaken knowingly. Thus, we need not modify the conditions to add an express knowledge requirement because scienter is already implied.

DISPOSITION

This matter is remanded for proceedings consistent with this opinion. In all other respects, the probation order (judgment) is affirmed.

/s/
Robie, Acting P. J.

We concur:

/s/
Duarte, J.

/s/
Hoch, J.